

NOT TO BE INCLUDED
IN BOUND VOLUMES

PGB
New York, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KIRKSTALL ROAD ENTERPRISES, INC. /
QUAY STREET ENTERPRISES, INC.

Employer

and

Case 2-RC-23547

WRITERS GUILD OF AMERICA EAST

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to a mixed mail-ballot / manual-ballot election conducted from November 17 through December 10, 2010,¹ and the administrative law judge's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The final tally of ballots shows 30 for and 25 against the Petitioner, with 4 sustained ballot challenges and 2 void ballots.²

¹ All dates are 2010 unless otherwise indicated. The ballots were counted on December 13. Despite the December 10 cutoff date, any ballot received by December 13 was counted.

² The initial tally, issued December 13, showed 25 for and 24 against the Petitioner, with 2 void and 10 challenged ballots, a potentially determinative number. On December 20, the Employer filed the objections at issue here. On

The Board has reviewed the record in light of the exceptions and briefs, has adopted the administrative law judge's findings and recommendations as modified below, and finds that a certification of representative should be issued.

The Employer objected "to the Region's conduct of the election." It alleged that 10 voters were disenfranchised, either because they never received a mail ballot or because the ballots they mailed in were not counted. Examining the evidence pertaining to each of those 10 voters, the judge rejected the Employer's claims as to 6 of them on various grounds, including credibility,³ but found evidence that 4 eligible voters either did not receive a mail ballot or mailed a ballot that went uncounted. However, the Union won the election by a five-vote margin. Accordingly, the judge observed that, even assuming all four would have voted "no," the outcome of the election would be unaffected.⁴ He therefore

December 21, the parties withdrew 4 challenges. Those 4 ballots were counted and a revised tally was issued, showing 28 for and 25 against the Petitioner. A hearing was held to resolve the 6 remaining challenges. Hearing Officer Rachel Preiser sustained 4 of the 6 challenges. The other 2 ballots were counted and a final tally issued, showing 30 for and 25 against the Petitioner.

³ The judge was sitting as a hearing officer in this representation proceeding. The Employer has excepted to some of his credibility findings. As explained below, in determining that the Employer's objections are without merit, we find it unnecessary to consider individual employees' testimony concerning whether they received or mailed their ballots. Accordingly, we find it unnecessary to pass on the Employer's exceptions to the hearing officer's discrediting of certain employees' testimony.

⁴ In reaching that conclusion, the judge made contradictory findings regarding employee Rebecca Morton, who did not receive a mail ballot. Initially, the judge found her ineligible to receive a mail ballot, and therefore her failure to receive one was "of no consequence." Later in his decision, however, he included Morton among the "four eligible voters" who either did not receive a ballot or mailed a ballot that the Region did not receive. We need not resolve this

dismissed the Employer's objections and recommended that the Petitioner be certified.

We agree with the judge's conclusion but find that it was unnecessary for him to sift through the testimony of individual employees. "[T]o set aside an election based on Board agent misconduct, there must be evidence that 'raises a reasonable doubt as to the fairness and validity of the election.'"⁵ Thus, the Employer, as the objecting party, must show Board agent misconduct. It failed to do so. The Region sent a mail-ballot kit to every voter on the mail-ballot list, and there is no evidence that the Region misplaced or otherwise failed to count any ballots it received in this election. As discussed below, the Employer's evidence is insufficient to raise a reasonable doubt as to the fairness and validity of this election.

The Employer sought to demonstrate Board agent misconduct by introducing testimony from voters who claimed not to have received a mail ballot. But Region 2 Supervisory Field Examiner Nicholas Lewis testified that everyone on the mail-ballot list was sent a mail ballot. Based on Lewis's testimony, the judge found that "[o]n November 17, 2010, manila envelopes containing a voting kit were mailed to the voters on the mail ballot list." The Employer does not except to that finding.

contradiction because our decision does not turn on the numerical analysis that the judge undertook.

⁵ *American Medical Response*, 356 NLRB No. 42, slip op. at 1 (2010) (quoting *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970)).

The Employer also introduced testimony from some voters whose ballots were not counted that they mailed their ballots to the Region. However, none of those individuals had his or her ballot returned as undeliverable, and none of those ballots ever turned up at the Regional Office—and the office was diligently searched. Such testimony, without more, fails to sustain the Employer’s burden of proof to show that the Region misplaced or failed to count some mail ballots, or engaged in any other misconduct that affected the fairness and validity of the election.

The Employer also introduced evidence regarding a mail ballot belonging to another election that was found among the ballots for this election. The misplaced ballot was removed and restored to its proper location, and Supervisory Field Examiner Lewis testified that *every* mail ballot that was returned to the Region in this election was duly counted. In support of that claim, Lewis further testified that all incoming mail ballots are routed to the election clerk’s office, and that, after the objections were filed in this case, “every desk drawer and file” in the election clerk’s office was searched, and no misplaced mail-ballot envelopes were found. The transient misplacement of a single ballot was thus a harmless error that was resolved without any effect on the election.

Finally, the Employer introduced evidence that, around the same time as this election, two mail ballots from a different election conducted by Region 2 were misplaced. But that was a different election. That evidence is not probative of ballot misplacement in *this* election. To the extent that the Employer points to this evidence of minor irregularities to support its allegation that they are the “tip”

that proves the existence of an unseen “iceberg” of irregularities, its argument fails as unfounded speculation. See *Enloe Medical Center*, 345 NLRB 874, 891 fn. 18 (2005).

In sum, we find it unnecessary to reach the judge’s voter-by-voter findings. Rather, we hold that, in the absence of Board agent misconduct, the Employer necessarily failed to show that the election must be set aside under the applicable *Polymers* standard. See 174 NLRB at 282.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Writers Guild of America East, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

INCLUDED: All full-time and regular part-time Producers, Field Producers, Post-Producers, Associate Producers, Senior Story Producers, and Story Producers employed by the Employer at and out of its facility located at 609 Greenwich Street, 9th Floor, New York, NY.

EXCLUDED: Editors, and all other employees, and guards, and supervisors as defined in the Act.

Dated, Washington, D.C., September 10, 2012.

Mark Gaston Pearce,	Chairman
Richard F. Griffin, Jr.,	Member
Sharon Block,	Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD